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CITATIONS

720-113—64——1

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONER

v.

JAMES K. TALLMAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 19, 1963.

OPINION BELOW

The opinion of the court of appeals (App. 19a) [1] is reported at 324 F. 2d 411.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1963 (App. 35a). A timely petition

[1] "App." refers to the appendix to this petition. "J.A." refers to the Joint Appendix filed in the court of appeals.

for rehearing was denied on October 16, 1963 (App. 35a). An application for leave to file a motion for reconsideration of the petition for rehearing was granted on November 8, 1963, and, on the same date, the motion for reconsideration was denied (App. 35a–36a). On January 11, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the orders withdrawing the public-domain lands within the Kenai National Moose Range in Alaska from various forms of private appropriation (Executive Order No. 8979, 6 F.R. 6471; Public Land Order No. 487, 13 F.R. 3462) also closed the lands to oil and gas leasing under the Mineral Leasing Act of 1920 (41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*), with the consequence that the leases thereafter issued by the Secretary of the Interior on 900,000 acres of Range land were invalidly issued and are subject to cancellation.[2]

STATUTES, REGULATIONS, AND ORDERS INVOLVED

Sections 1 and 17 of the Mineral Leasing Act of 1920 (41 Stat. 437, 443, as amended, 30 U.S.C. 181, 226); Executive Order No. 8979, 6 F.R. 6471; Public

[2] There is also latent in the case the following jurisdictional question (see pp. 17–20, *infra*):

Whether the holder of an oil and gas lease issued by the Secretary is an indispensable party to an action by a subsequent applicant to compel the Secretary to issue a lease to him on the ground that the lease first issued was invalid.

Land Order No. 487, 13 F.R. 3462; § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9), as in force from time to time (12 F.R. 7334; 20 F.R. 9009; and 23 F.R. 227); and an order of the Secretary of Interior issued on August 2, 1958 (23 F.R. 5883) are set forth in pertinent part in Appendix B, pp. 8a–18a, *infra*.

STATEMENT

Between October 15, 1954, and January 28, 1955, D. J. Griffin and other persons filed applications for oil and gas leases on some 25,000 acres of the public domain located within the Kenai National Moose Range in Alaska. On August 14, 1958, the respondents filed offers to lease the same lands. Acting pursuant to § 17 of the Mineral Leasing Act of 1920 (App. 8a), which requires leases on unproven lands to be given to the qualified persons "first making application," the Bureau of Land Management of the Department of Interior issued leases on the tracts, effective September 1, 1958, to the Griffin group of applicants. In October 1959 the respondents' applications were rejected on the ground that the lands had been leased to prior applicants (App. 24a).

From the rejection of their applications, the respondents appealed to the Director of the Bureau of Land Management (J.A. 25–31) and then to the Secretary of the Interior (J.A. 32–39, 63), both of whom affirmed the decision. Respondents thereafter brought this action to compel the Secretary to issue oil and gas leases to them (J.A. 1–11). The Griffin group, to whom leases on the same lands had previ-

ously been issued, were not made parties to the action.

The district court granted summary judgment in favor of the Secretary dismissing the complaint (J.A. 73–75). The court of appeals reversed (App. 35a). It held that the Executive Order by which the Moose Range had been created in 1941 (Exec. Order No. 8979, App. 9a) had withdrawn the lands from availability for leasing under the Mineral Leasing Act; that they were not reopened for leasing until August 14, 1958 (as a consequence of a revised departmental regulation); that the applications of the Griffin group, filed while the lands were "closed" to leasing, were ineffective; that the leases granted to them were nullities; and that the respondents, as the persons "first" making application for leases after the lands became available for leasing in 1958, were accordingly entitled to be issued leases on their applications.[3]

REASONS FOR GRANTING THE WRIT

I

THE QUESTION IS IMPORTANT

1. Some 433 oil and gas leases covering over 900,000 acres of the Kenai Moose Range have been issued by the Secretary on applications filed prior to 1958—*i.e.*, during the period that the court of appeals has held the Range was "closed" to leasing. The area so leased constitutes substantially the entirety of the portion of the Range on which the Secretary's regulations permit leasing (essentially, the northern half).

[3] As to the application by respondent Coyle, the decision was based on Public Land Order No. 487 rather than the 1941 Executive Order. See note 8, *infra*.

We are advised by four oil companies [4] that they have invested over $90 million in developing the leases in which they have interests. A major oil strike was made in the Range in 1957, and other discoveries have since been made. There are now 22 leases in production or participating in production. Production to date under the leases has exceeded 26 million barrels of oil [5] and 5 billion cubic feet of gas.[6] From its retained royalties (5% initially on some earlier leases; 12.5% generally), the United States has received over $8 million, reflecting production worth more than $77 million. The Geological Survey of the Department of Interior estimates that the proven reserves of oil and gas subject to the leases have a value ranging from $750 million to over $1 billion. The production in the Kenai Range is the only commercial oil and gas production in the State of Alaska.

The decision below, if correct, means that all the leases on the Kenai Range were improperly issued and are now subject to cancellation by the Secretary. The decision thus jeopardizes investments of millions of dollars made by private persons in reliance upon the Secretary's action and casts in doubt the ownership of hundreds of oil and gas leases of great value. The drastic implications of the decision, the number of people affected by it, the enormous value of the interests at stake, and the confusion created by the

[4] Richfield Oil Corporation, Standard Oil Company of California, Marathon Oil Company, and Union Oil Company of California.

[5] 26,248,000 barrels to October 31, 1963.

[6] 4,896,000,000 cubic feet to July 31, 1963, and, of course, substantial quantities since then.

decision give more than ample reason for review of the decision by this Court.

2. It is important also that the question be promptly resolved in order to forestall a multiplicity of litigation and to remove the disruptive effects of the controversy upon the orderly development of the petroleum resources in the Kenai basin.

As the predicate for directing the Secretary to issue leases to the respondents, the opinion of the court of appeals declares that the leases previously issued to the Griffin group of applicants are "nullities." The Griffin lessees, however, were not parties to this proceeding and are in no way bound by the decision. How the decision is to be given effect in those circumstances the court does not say, but should any attempt be made either by the Secretary or the respondents to interfere with the rights of the Griffin lessees, new court actions must inevitably result. Since the present proceedings could not be invoked as *res judicata*, the potentiality for inconsistent judgments is great. This case, moreover, involves only 20 of the 433 leases issued in like circumstances, and attempts by other lessees to quiet their titles may be anticipated.

Pending the final resolution of the question, the further development of the Kenai basin will be seriously disrupted, for the lessees now in possession are unlikely to continue to expend millions of dollars for development of leases and construction of transmission facilities—expenditures providing employment and income vital to the Alaskan economy—while the ownership of the leases remains in doubt. In some cases, failure promptly to make additional investments of a conservation nature could cause a permanent loss in

the long-run productivity of the field. The doubts created by the decision may also affect the willingness of purchasers of the oil and gas production to continue to pay the existing lessees and royalty-owners, at least without complicated arrangements protecting them from further liability. Among those peculiarly affected by any resulting disruption in the current payment of royalties would be the State of Alaska, which now receives, as an important contribution to its revenues, 90% of the royalties and rentals reserved by the United States under the leases. While all the ramifications of the decision of course cannot be foreseen with certainty, prompt resolution of the question by this Court is in our judgment essential to avoid a major dislocation in the development of the petroleum resources of Alaska.

II

THE DECISION IS WRONG

The Kenai National Moose Range was created in 1941 by Executive Order No. 8979 (App. 9a), by which some two million acres of the public domain were "withdrawn and reserved * * * as a refuge and breeding ground for moose."[7] The order provided that—

> None of the above-described lands * * * shall be subject to settlement, location, sale, or

[7] The President has inherent power to effect such withdrawals. *United States* v. *Midwest Oil Co.*, 236 U.S. 459. The power was confirmed in part, though not limited, by the so-called Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141–142. The Kenai Range order did not expressly invoke the Pickett Act.

> entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, * * *.

The question is whether that provision "closed" the Range to leasing under the Mineral Leasing Act of 1920 and made invalid any leases issued on applications filed while it was outstanding.[8]

1. Ever since the adoption of the Mineral Leasing Act in 1920, the Department has consistently, as it did in this case, characterized oil and gas leasing under that Act as not effecting a disposition or appropriation of land. It has accordingly held [9] that, unless it specifically mentions mineral leasing, an order withdrawing lands from availability for private appropriation does not *per se* [10] bar oil and gas leasing.

[8] An area along the shore of Cook Inlet was excepted from the Executive Order but was subsequently, by order of the Secretary of Interior, "temporarily withdrawn from settlement, location, sale or entry, for classification and examination and in aid of proposed legislation." (Public Land Order No. 487, 13 F.R. 3462 (1948).) The court of appeals also held invalid any leases issued in the Cook Inlet area on applications filed while that order was outstanding. One of the leases in this case (that conflicting with respondent Coyle's application) was in that category. As to it, therefore, the question turns upon the effect of the 1948 Public Land Order rather than of the 1941 Executive Order.

[9] See, *e.g.*, *Opinion of the Solicitor*, 48 I.D. 459 (1921) ("reserved from entry, location, or other disposal"); *Noel Teuscher*, 62 I.D. 210 (1955) ("withdrawn from settlement, location, sale or entry"); *Opinion of the Solicitor*, 55 I.D. 205, 211 (1935) ("temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification").

[10] The Secretary may, of course, conclude that the purposes of a particular withdrawal would be impaired by leasing and for that reason decline to issue leases in the exercise of his discretion. See *e.g.*, *Earl J. Boehme*, 62 I.D. 9 (1955); *Haley* v. *Seaton*, 281 F. 2d 620 (C.A.D.C.).

That widely-publicized [11] view is supported by a variety of considerations. In the first place, the interests created by an oil and gas lease under the Act are very limited, consisting essentially of but a right to prospect for oil and gas and then to produce from wells located on the land whatever oil and gas is discovered.[12] In the second place—and with peculiar significance in the light of the function of a withdrawal order—oil and gas leasing, unlike outright dispositions of land, is not usually inconsistent with the reservation of lands primarily for other purposes.[13] Finally, in contrast to private appropriation of the public domain by settlement, entry or location—in which rights are acquired by autonomous private action (*e.g.*, staking out a location)—the issuance of oil and gas leases always remains subject to the Secretary's discretion. While formal withdrawal of

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[11] In 1951, well before the events involved in this case, the leading treatise on mineral leasing in the public domain described the Department's practice as follows:

> * * * Ordinarily, a withdrawal from sale or other disposition of the public domain is no bar to the issuance of a lease, as leasing is not disposing of the land. It is merely granting the right to prospect and, upon discovery, to produce oil or gas from the land under prescribed conditions. Title to the land and the minerals therein remain in the United States. * * *

Hoffman, *Oil and Gas Leasing on the Public Domain* (1951), pp. 33–34. Mr. Hoffman was the Chief of the Branch of Minerals of the Bureau of Land Management.

[12] For the limited nature even of that right, see *Boesche* v. *Udall*, 373 U.S. 472, 477–478.

[13] That view is reflected in the Mineral Leasing Act itself, which by its own terms was made fully applicable to lands previously withdrawn for wildlife conservation or other purposes. See § 1, App. 8a.

lands from settlement and the like is essential to prevent rights from being acquired by "adverse" private action, the regulation of oil and gas leasing—to whatever extent is necessary or desirable to prevent interference with the purposes of the withdrawal—can be left to the Secretary's discretion, exercised by regulation or individual determinations. Seen in the light of those considerations and with an appreciation of the basic function of withdrawal orders, the Secretary's interpretation of the 1941 Executive Order as not barring mineral leasing was, we submit, not only textually permissible but the only sound one.

2. But far more important than the degree to which the language of the order compels that reading is the fact that the agency primarily responsible for the administration of the public lands has given it that interpretation. That interpretation has, moreover, been given extensive practical application in the conduct of the Department's affairs over a long period of time; it has been relied upon by private persons in the making of investments of millions of dollars; and it has been fully reported to and acquiesced in by Congress.

a. The Department issued the first oil and gas lease on land within the Moose Range (albeit on only 15 acres) in 1953.[14] In 1954, four leases were issued covering 2,201 acres; in 1955, 28 leases covering 55,192 acres; in 1956, 31 leases covering 67,631 acres; and in

[14] The leasing data summarized here is based on a survey of the records of the Anchorage land office. The compilations thus made may be incomplete in some details but they are sufficiently accurate for present purposes.

1957, 3 leases covering 4,800 acres. All told, during the years 1953–1957, the Department issued 67 leases covering some 133,000 acres.

Offers covering almost the whole of the rest of the Range had also been accepted for filing, and initially processed, during that period,[15] but final action on them had been suspended pending the issuance of regulations imposing new restrictions on oil and gas leasing in wildlife refuges. The regulations were issued on January 8, 1958 (App. 13a–16a), and an implementing order specifically applicable to the Kenai Range was issued on August 2, 1958 (App. 17a–18a). Their effect was to forbid mineral leasing altogether in the southern half of the Range and to require new restrictions to be included in leases issued in the northern half. Promptly after their issuance, the pending applications for lands in the northern half were acted upon and 366 leases (including the Griffin leases) were issued on them covering 784,000 acres—substantially the whole of the northern portion of the Range that had not already been leased.

The administrative construction of the 1941 Executive Order as leaving the Kenai Range available for leasing has thus been acted upon, not merely sporadically or inconsistently, but to the extent of leasing on that basis substantially the whole of the Range not closed to leasing by the regulations. It was executed, in short, to the point of exhaustion of the land avail-

[15] Over 300 applications were pending on file as early as August 1955, almost two years before the first discovery of oil (in July 1957) and the resulting flood of applications. BLM Memorandum to Area Administrator, Area 4, August 12, 1955.

able for leasing. A more conclusive showing of the practical construction given to an order by those charged with its administration could not be made.[16]

b. In reliance upon the Secretary's interpretation of the Executive Order, extensive development has taken place on the Range, involving the expenditure of large sums of money. Long-continued reliance by private persons upon the action taken is surely one of the most compelling reasons for not disturbing an established administrative course of conduct. See, *e.g.*, *McLaren* v. *Fleischer*, 256 U.S. 477, 481.

c. In early 1956, the appropriate committees of Congress had under consideration proposals to restrict mineral leasing in wildlife refuges. During the hearings, representatives of the Department advised the committees, *inter alia*, of the issuance during 1954

[16] The court of appeals, having held that the Range was "closed" to leasing by the 1941 Executive Order (making the Griffin applications invalid), went on to hold that the northern portion was "opened" for leasing by the 1958 regulations and order mentioned above (making the respondents' applications, filed after their issuance, valid). Since the issue here is the initial question of the effect of the 1941 Executive Order, the regulations are not directly involved. However, because of the confusion about their purpose engendered by the court of appeals' opinion—and the arguments respondents make based upon them—we have added as an Appendix to this petition (App. 1a–7a) a full explanation of the evolution of the regulations. As is there shown, the regulations clearly presupposed the availability of the Kenai Range for leasing under the 1941 withdrawal order—which is, indeed, why they forbade leasing on the southern portion—and thus, far from supporting respondents, give formal confirmation of the consistent administrative practice.

and 1955 of 21 leases in the Kenai Moose Range.[17] On June 29, 1956, pursuant to an interim procedure that had been agreed upon,[18] the Department submitted to the House Committee on Merchant Marine and Fisheries for its advance approval a proposal to lease an additional 71,680 acres in the Moose Range. After a public hearing, the Chairman of the Committee, by letter dated July 25, 1956, advised the Department that the Committee was in agreement that the leases would not be detrimental to wildlife uses and should be issued.[19] The leases were then issued and it was under them that the first discovery of oil (in July 1957) in the Kenai Range was made.[20]

Nor was Congressional approval of the leasing activities in the Kenai Range limited to informal committee advice and legislative inaction. The "Alaska Submerged Lands Act" of July 3, 1958 (72 Stat. 322), authorized for the first time the granting of oil and gas leases on inland navigable waters in Alaska. Sec-

[17] Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., pp. 135, 141, 147; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92–93.

[18] See H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12–13.

[19] Letter dated July 25, 1956, Chairman Bonner, Committee on Merchant Marine and Fisheries to Director, Fish and Wildlife Service, attached to Department of Interior Press Release, January 8, 1958.

[20] The discovery and the leasing activities were, of course, also reported to the President. Annual Report of the Secretary of the Interior, 1957, pp. 279, 356; *id.*, 1958, pp. xxxv, 104, 199, 258, 321.

tion 6 gave existing lessees (and those with pending offers) a preference right to have their leases (or applications) expanded to include any navigable waters within their boundaries. The history of that provision shows that one of the specific purposes was to protect the holders of producing leases in the Kenai Range (*i.e.*, the leases granted in 1956 on which oil had been discovered in 1957) against leases being given to other persons on navigable waters overlying the oil and gas deposits that had been discovered and developed by them. It was adopted with full knowledge of the leasing activities that had taken place in the Kenai Range and of the intention of the Department to continue issuing leases on the large number of pending applications,[21] and the committee report expressly referred to the producing leases on the Kenai Range as among those meant to be augmented by the inclusion of navigable waters.[22] Thus the Congress not only regarded the outstanding leases as validly issued but, acting on that belief, provided for their enlargement. That purposeful Congressional acceptance of the established administrative construction, if it does not amount to actual ratification, at the very least adds greatly to its weight.[23]

3. The orderly administration of public affairs forbids the courts lightly to invalidate a long-continued

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[21] See Hearings before the Senate Committee on Interior and Insular Affairs on H.R. 8054, 85th Cong., 2d Sess., pp. 19–20, 24–25, 32, 76–77, 93–94; 104 Cong. Rec. 11836–11838.

[22] S. Rep. No. 1720, 85th Cong., 2d Sess., pp. 3, 5–6.

[23] See, *e.g.*, *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 293; *City of Fresno* v. *California*, 372 U.S. 627; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119.

course of administrative action, on the basis of which private rights have become vested and to which all the responsible agencies of government have adjusted their activities. The question is not, this Court has repeatedly said, whether the court would have adopted the same interpretation as an original matter; but only whether there was a "reasonable" basis for the administrative interpretation. See, *e.g.*, *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472–473; *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153–154. To say in this case, as did the court of appeals, that the Secretary's interpretation of the withdrawal order was wholly "unreasonable" is to deprive that standard of meaning. The decision below, so based, is both plainly wrong and in conflict with the decisions of this Court.

4. What has been said would be controlling even if the question of interpretation went to a statutory or other limitation on the Secretary's power. In fact, the question here goes only to a matter of form. Admittedly, no statutory limitation is involved. And, while the 1941 withdrawal order was issued by the President, thus suggesting the presence of Presidentially-imposed limitations, the President soon rid himself of the function and delegated to the Secretary the full power to withdraw lands or to modify or revoke any existing withdrawals.[24] With that del-

[24] Executive Order No. 10355 (17 F.R. 4831), issued in 1952, delegated to the Secretary authority, by public land orders, "to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the

egation of functions, the Secretary acquired plenary power over the status of the Range, and the 1941 Executive Order became, for all practical purposes, the Secretary's own order.[25]

The question, then, is not one of power at all, but solely one of the Secretary's interpretation of his own order—that is to say, of words he had the power to change at will. No interests had become vested in reliance upon some other meaning of the words, and the Secretary's construction of them, whether or not grammatically "unreasonable," was of long standing, was open and notorious, was acquiesced in by Congress, was reflected in the regulations, was acted upon repeatedly, and was relied upon by innocent lessees in the investment of millions of dollars. Had the Secretary been able to foresee the court of appeals' ruling, he could readily have modified the order prior to the events in question to remove any doubt; he did not, only because to him its meaning was clear. In those circumstances, we submit, the construction followed by the Secretary in practice became a controlling gloss on the words. The Secretary had and in fact exercised the power to lease the Range during 1953–1957, and his alleged misuse of words in doing so, by which no rights were prejudiced, is simply beside the point. And surely a grammatical "error"

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authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." That order replaced a somewhat more limited delegation made in 1943. See Exec. Order No. 9337, 8 F.R. 5516.

[25] The order applicable to the Cook Inlet area was issued after the delegation, so it was originally issued in the Secretary's name (see note 8, *supra*).

by the Secretary in construing words he has the power to change, affecting no other substantial interests, cannot justify sacrificing the interests of hundreds of innocent persons who, in reliance on his construction, have expended vast sums of money to acquire vested rights of enormous value.[26]

There have been few occasions, we submit, in which a court has invalidated so extensive a course of administrative action and caused so serious a dislocation of vested rights with so little justification. Even apart from the vast interests at stake, certiorari would be warranted to correct so plain a judicial intrusion upon the administrative function.

III

THE LATENT JURISDICTIONAL QUESTION IS ALSO IMPORTANT

Because the court of appeals had previously rejected the argument in *Barash* v. *Seaton*, 256 F. 2d 714, we did not contend in the courts below that there was a lack of indispensable parties. There is authority, however, that the indispensable-party question is a "jurisdictional" one that may be noticed at any

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[26] In defense of the court of appeals, it should be said that in originally deciding the case it was not informed of the impact its decision would have. The respondents' brief stated that no leases had been issued on the Range prior to 1958 and that the oil discovered in 1957 was not within the boundaries of the Moose Range (Br. 30, 40). The government's brief, unfortunately, failed to correct the misapprehensions. On the petition for rehearing and the motion for reconsideration, however, the court was fully informed both of the past leasing practices and of the extensive oil development, yet refused to reconsider the case.

time,[27] and the question may thus remain in the case notwithstanding our failure to preserve it below. Even so, in view of the pressing need for a removal of the doubt created by the decision below over the ownership of the extensive oil lands in the Kenai Range, the government will urge the Court (should certiorari be granted and should the Court agree that the action is without merit) to dispose of the case on the merits without passing on the jurisdictional question, a course the Court has followed with some frequency in the past.[28] Since the Court may nevertheless find it necessary to reach the indispensable-party question, we take note of it here in order to apprise the Court of its presence and to show that it is an independently substantial and important question the presence of which does not detract from the need for review by this Court.

This suit is one to require the Secretary to issue oil and gas leases to respondents on some 25,000 acres of land on which oil and gas leases have already been issued to D. J. Griffin and other persons. The Griffin lessees were not joined as parties. They are, in our view, indispensable parties in whose absence the action may not proceed.

Since the very predicate of the respondents' claim (and of the court of appeals' decision) is that the

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[27] See *Hoe* v. *Wilson*, 9 Wall. 501; *Brown* v. *Christman*, 126 F. 2d 625, 631 (C.A. D.C.); *Flynn* v. *Brooks*, 105 F. 2d 766, 767–768.

[28] *Ohio* v. *Helvering*, 292 U.S. 360, 368; *Bourdieu* v. *Pacific Oil Co.*, 299 U.S. 65, 70–71; *Brooks* v. *Dewar*, 313 U.S. 354, 359–360; cf. *Inland Empire Council* v. *Millis*, 325 U.S. 697, 700.

prior applications filed by the Griffin group were invalid, leaving respondents as the "first" qualified applicants entitled to the leases, it is evident that the interests of the Griffin lessees will be vitally affected by any judgment entered in this action. The other side of the indispensable-party coin is perhaps even more to the point: since no effective relief can be given without affecting the interests of the Griffin lessees, and since no judgment entered in their absence can bind them, without their presence the court lacks capacity to grant effective relief. Viewed either way, the most rigorous tests for determining whether a party is indispensable are met."

The court's lack of capacity effectively to decide the controversy without being able to bind the Griffin lessees may be readily seen by supposing that the court of appeals' judgment were allowed to become final, that the Secretary sought to cancel the Griffin leases in order to comply with it, and that the Griffin lessees obtained a final judgment in the Ninth Circuit (the likely forum) enjoining the Secretary from cancelling their leases (in a proceeding in which the respondents similarly were not made parties). The result would be precisely the sort of unseemly impasse (with the Secretary in the middle, subject to conflicting orders) that the indispensable-party rules are designed to avoid.

Quite apart from the questions of rudimentary power, moreover, sound judicial administration re-

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" See, *e.g.*, *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 164; *Shields* v. *Barrow*, 17 How. 129; *Brady* v. *Work*, 263 U.S. 435; *New Mexico* v. *Lane*, 243 U.S. 52.

quires the presence of the Griffin lessees to assure a fully adversary proceeding. In terms of the economic interests directly involved in this lawsuit, the real adversaries are the respondents on the one hand and the Griffin lessees on the other. The government's interests are defined by quite different considerations, looking more to the effective administration of the land laws than to the outcome in terms simply of who will end up holding the leases. In this instance, our views apparently coincide with the interests of the Griffin lessees, but that need not always be so, particularly with respect to all of the issues or arguments. To assure a full presentation of the issues in a proceeding such as this, it is essential that all three parties—the successful applicant, the unsuccessful applicant, and the Secretary—be before the court.

The question of the parties required to be joined in proceedings challenging the Secretary's grant or rejection of applications for oil and gas leases is an important and recurring one. While, as noted above, our primary purpose is to obtain a resolution of the issue on the merits, the latent presence of that additional question—and the consequent possibility that the merits may not be reached—at the very least does not counsel against the grant of review by this Court. To the contrary, the potentiality of inconsistent judgments resulting from the absence of the Griffin lessees as parties makes it all the more imperative that the judgment below not be allowed to stand.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1964.

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APPENDIX A

The Development and Purpose of the Regulations

Even when withdrawn lands remain subject to leasing under the withdrawal orders, it is established that the Secretary has discretion to decline to issue leases, or to impose conditions on them, when necessary to prevent interference with the purposes for which the withdrawal was made.[1] The regulations establishing the leasing policies to be followed in wildlife refuges are an exercise of that power. Starting with the basic "multiple-use" policy followed by the Department in the administration of the public lands, they seek, by appropriately limiting or conditioning the grant of leases in wildlife refuges, to accommodate the two ends of protecting wildlife while fostering mineral development. The advocates of development and the advocates of conservation have, needless to say, differing views about how the balance is to be struck, and the development of the regulations, with the interim "suspensions" of final action on pending lease applications, reflects simply the continuing process of accommodating the opposing interests.

The regulation specifically governing oil and gas leasing in wildlife refuges (43 C.F.R. 192.9) was first adopted in 1947. In its original form (App. 10a), it provided simply that leases in wildlife refuges must be subject to an approved unit plan and must require

[1] *E.G.*, *Haley* v. *Seaton*, 281 F. 2d 620 (C.A.D.C.).

the advance consent of the Secretary to any drilling or prospecting. On August 31, 1953, the Director of the Bureau of Land Management advised all regional administrators that "a possible revision of policy and regulations" on leasing in wildlife refuges was being studied and directed them in the meantime to "suspend action on all pending oil and gas lease offers" within such refuges. The direction was given by an internal, unpublished, memorandum and amounted simply to instructions given to subordinates on the action to be taken by them pending further advice. It in no way purported to, or did, prevent the issuance of leases with the approval of the national office, and leases on a number of different refuges (including the Kenai Range) were in fact issued during the so-called "suspension" period.[2] *A fortiori,* the unpublished memorandum in no way prevented the continued filing of lease offers on lands otherwise available for leasing.[3] It was during this period that the Griffin applicants filed their offers.

On December 8, 1955, the anticipated revision of the refuge-leasing regulation was promulgated. The new regulation (App. 11a) was much more restrictive and gave increased power to the Fish and Wildlife

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[2] See pp. 12–13, *supra; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101*, 84th Cong., 2d Sess., pp. 92–93; *Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc.*, 84th Cong., 2d Sess., pp. 142–146; 102 Cong. Rec. A6581–A6583 (August 20, 1956).

[3] That was made explicit in a subsequent memorandum from the Bureau to an Area Administrator, advising him that the 1953 memorandum did not "prevent the filing of new offers" and that all pending applications would "preserve their priority." BLM memorandum to Area Administrator, Area 4, August 12, 1955.

Service to regulate or veto refuge mineral development. It listed in an Appendix A a number of refuges (not including Kenai) in which no leasing at all would be permitted because of their importance to the preservation of rare species of plant or animal life. It then listed in Appendix B certain areas (including a small part of the Kenai Range) in which the Fish and Wildlife Service had determined that leasing, unless closely regulated, would jeopardize conservation purposes. In such areas, leasing was to be permitted only upon the approval by the Director of the Service of a "complete and detailed operating program for the area." In all other wildlife areas, the regulation provided, "Oil and gas leases may be issued" provided they contained specified conditions requiring approval by the Service of the type of prospecting conducted and requiring adoption of a unit plan approved by the Service. The main significance of the 1955 regulation for present purposes is that, in expressly including a part of the Kenai Range in the areas available for leasing only upon approval of a detailed operating plan and impliedly including the rest of the Range in the third category, it necessarily assumed the preexisting availability of the Range for leasing under the 1941 withdrawal order.

The 1955 regulation had the effect of terminating the prior "suspension" of leasing that had been directed pending its adoption. However, upon the almost immediate introduction in Congress of bills further to restrict leasing in wildlife refuges, upon which hearings were begun in January and February 1956,[4] the field offices were directed to continue to withhold

[4] See Hearings cited in note 2, *supra*.

final action on lease applications,[5] and study of the leasing policy was resumed. Once again, of course, the "suspension" consisted simply of operating instructions to subordinates and, with appropriate internal (and sometimes Congressional[6]) approval, a significant number of leases on refuge lands (including Kenai) continued to be issued.

The final result of the controversy over the leasing policies to be followed in wildlife refuges was the adoption, on January 8, 1958, of a second complete revision of the regulation. The new regulation (App. 13a) was a major victory for the conservationists. It prohibited oil and gas leasing in most wildlife refuges altogether,[7] conferring "sole and complete" jurisdiction over them to the Fish and Wildlife Service. The only exceptions (as to exclusively federal lands) were (1) lands withdrawn for a dual purpose (grazing and forage as well as wildlife conservation) and (2) wildlife refuges in Alaska. As to such lands, moreover, the Bureau of Land Management and the Fish and Wildlife Service were to reach agreements specifying the areas which "shall not be subject to oil and gas leasing" and the stipulations required to be included in leases issued on the remaining areas. The agreements were to become effective upon approval by the

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[5] Short-term interim suspensions were first directed by various interdepartmental communications. Then on March 30, 1956, the Bureau of Land Management by teletype directed that the suspension be continued until further notice, explaining that "This does not suspend all preliminary action which should continue to be taken. The suspension applies only to final actions in such matters."

[6] See pp. 12–13, *supra;* H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12–13.

[7] Unless leasing was necessary to prevent draining, 43 C.F.R. 192.9(b)(2).

Secretary and publication in the Federal Register. The regulation further provided that "Lease offers for such lands will not be accepted for filing [*i.e.*, new lease offers] until the tenth day after the agreements * * * are noted on the land office records" and that "All pending offers or applications heretofore filed * * * will continue to be suspended until" the conclusion of the agreements.

Pursuant to the regulation, there was published in the Federal Register on August 2, 1958, an order of the Secretary announcing the agreement reached with respect to the Kenai Moose Range (App. 17a). The order decreed that certain lands within the Range (essentially, the southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." It then provided:

> The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers * * *. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation * * * will now be acted upon and adjudicated in accordance with the regulations.
>
> * * * lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office * * *.[*]

[*] The Secretary recognized that most of the area had already been filed upon, and that in fact there would be little left available for new applicants. In announcing the order, he said: "Most of these lands are now covered by applications that will be adjudicated under the regulations of the Department." Department of Interior Press Release, July 25, 1958.

The agreement was noted in the Anchorage land office on August 4, 1958, and the respondents filed their applications on the tenth day after that, August 14, 1958.[9] Shortly after the order was issued, the Department, as announced, began processing the already-pending offers that had previously been suspended. Effective September 1, 1958, it granted leases on the lands in suit to the Griffin applicants on the basis of their offers that had been pending since January 1955. When in due course the new offers filed on August 14, 1958, were reached for adjudication, the respondents' offers were, as noted in the Statement, rejected on the grounds of the prior leasing.[10]

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[9] The order, to avoid a race to the land office, provided that all offers filed within ten days after filing was permitted (*i.e.*, during August 14–24) would be treated "as having been filed simultaneously." Under the regulations, priority as among simultaneously-filed offers is to be determined by a drawing. 43 C.F.R. 295.8. In the drawing later conducted among the offers filed during the period August 14–24, the respondents' applications were the first drawn covering the land in suit, and they accordingly acquired a priority date as of August 14, 1958, and ahead of any other offers filed during that period. Their applications remained, of course, junior to any valid applications that had been previously filed and were already pending.

[10] The circumstance that the lands had already been leased before the drawing was held among the offers "simultaneously" filed on August 14–24, 1958 (see note 9, *supra*), apparently thought bizarre by the court of appeals, is not unusual. Lease offers are processed in the order of filing and leases are issued as soon as an acceptable offer is reached. The pending lease offers were therefore acted upon before there was any occasion to examine the offers filed after August 14, 1958. The only purpose of the drawing later held, in turn, was to establish the order in which the offers "simultaneously" filed on August 14–24 would be processed. They could hardly have been processed (to see whether they conflicted with previously-issued leases) before the order of processing was established (*i.e.*, before the drawing).

From the terms and evolution of the regulations, it is evident that they have consistently taken as their premise that the wildlife refuges to which they applied—specifically including the Kenai Moose Range—were fully subject to mineral leasing under the withdrawal orders by which they were created. Their province has been to *restrict* the leasing activities otherwise permissible, with each version of the regulations prohibiting leasing altogether on larger and larger areas of refuge lands. For the court of appeals to hold, as it did, that the 1958 revision of the regulation (and the implementing order of August 2, 1958) "opened" the northern half of the Moose Range to leasing for the first time is thus a remarkable inversion: what the 1958 regulation and order did was, not to *open* the northern half of the Range, but to *close* the southern half.

The real significance of the regulations lies simply in their confirmation that the Department has from the beginning construed the 1941 Executive Order as not barring mineral leasing and has acted consistently with that construction throughout the period involved here. The 1955 regulation confirmed that understanding by its express mention of the Kenai Range, and the 1958 regulation (and its implementing order) even more pointedly confirmed it by specifically directing the resumption of processing of lease offers previously filed on the Kenai Moose Range. The regulation constitutes, in short, a formal reaffirmation of the consistent administrative construction—repeatedly acted upon by the Department, repeatedly relied upon by the lessees, and repeatedly endorsed by Congress—that the 1941 Executive Order did not forbid mineral leasing.

APPENDIX B

STATUTES, ORDERS, AND REGULATIONS INVOLVED

1. STATUTES

Sections 1 and 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by 60 Stat. 950 (30 U.S.C. 181, 226):

> SEC. 1. Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. * * *
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> * * * * * *
>
> SEC. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *. When the lands to be leased are not

within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under said sections shall be entitled to a lease of such lands without competitive bidding. * * *

2. WITHDRAWAL ORDERS

a. Executive Order No. 8979, December 16, 1941 (6 F.R. 6471):

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192–211, as amended:

* * * * *

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of

public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360–361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471–471o: * * *.

b. Public Land Order No. 487, June 16, 1948 (13 F.R. 3462):

> By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C. Title 43, secs. 141–143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:
>
> Subject to valid existing rights, the public lands within the following-described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation: [Description omitted; includes, *inter alia*, most of the area excepted from Executive Order No. 8979, *supra*.]*

* * * * *

3. REGULATIONS AND IMPLEMENTING ORDER

a. As originally issued on October 29, 1947 (12 F.R. 7334), § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9) provided:

> § 192.9 *Leases for wildlife refuge lands.* No noncompetitive oil and gas lease under the act will be issued for lands within a wildlife

*Public Land Order No. 487 was revoked on September 9, 1955 by Public Land Order No. 1212 (20 F.R. 6795). The leases in that area which conflict with respondent Coyle's application were, however, issued on applications filed while Order No. 487 was still in force, and it is on that basis that the court of appeals held them invalid.

refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service. Subject to the same two conditions, competitive leases also may issue for refuge lands. Even if these conditions are not met, competitive leases may nevertheless issue if Fish and Wildlife Service reports that oil and gas development may be conducted without destroying the usefulness of the lands as a sanctuary for wildlife, or, in the absence of such a report, wherever the Secretary determines that the national interest in securing the contemplated oil and gas production outweighs the importance of maintaining the refuge as a sanctuary for wildlife.

b. As revised on December 8, 1955 (20 F.R. 9009), § 192.9 of the Regulations provided:

§ 192.9 *Leasing of wildlife refuge lands.* (a) Geological and geophysical prospecting permits may be issued by the Fish and Wildlife Service on areas subject to its jurisdiction prior to leasing under such terms and conditions as that Service may prescribe.

(b) ~~(1)~~ Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service

reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

(2) The following conditions shall be expressed in any lease issued under this section:

(i) Geological and geophysical prospecting conducted on the leased premises shall be of a type and at a time satisfactory to the Fish and Wildlife Service.

(ii) No drilling operations shall be conducted under the lease until such lease has been committed to an approved unit plan. However, the Secretary may, in his discretion, permit or require drilling if he determines that a unit plan including the leased area cannot be secured and that drilling is necessary to protect the interests of the United States.

(*a*) A unit agreement which includes lands administered for wildlife conservation shall contain a provision that no drilling operations may be conducted on the unitized portion of the Government-leased lands administered for wildlife conservation without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations.

(*b*) In every instance, a plan of development which includes lands administered for wildlife conservation shall not be approved

without the concurrence of the Fish and Wildlife Service.

(iii) Lessees shall observe and comply with all State and Federal laws and regulations relating to wildlife and shall take such action as is necessary to assure observance and compliance with these laws and regulations by lessees, employees and agents.

APPENDIX A—FISH AND WILDLIFE SERVICE LANDS NOT AVAILABLE FOR LEASING

* * * * *

APPENDIX B—FISH AND WILDLIFE SERVICE LANDS AVAILABLE FOR LEASING UNDER A SATISFACTORY DEVELOPMENT AND OPERATING PLAN

* * * * *

Kenai: The following areas and all lands within one mile of Tustemena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

* * * * *

c. As revised on January 8, 1958 (23 F.R. 227) and now in force (43 C.F.R. 192.9 (1963)), § 192.9 of the Regulations provides:

§ 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands*—(a) *Definitions*—(1) *Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(2) *Game range lands.* Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.

(3) *Coordination lands.* These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the act of March 10, 1934 (48 Stat. 401), as amended by the act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.

(b) *Leasing policy and procedure.* (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph.

(2) In instances where it is determined by the Geological Survey that any of the lands mentioned in paragaph (a)(1), or any of the lands mentioned in paragaph (a) (2), (3) and

(4) of this section and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the United States Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources.

(3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. As to coordination lands, representatives of the Bureau of Land Management and the United States Fish and Wildlife Service will, in cooperation with the authorized members of the various State game commissions, confer for the purpose of determining by agreement those lands which shall not be subject to oil and gas leasing.

(4) The remaining lands in paragraph (a) (2) and (4) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in paragraph (a) (3) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the

United States Fish and Wildlife Service, and the Bureau of Land Management.

(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b)(3) of this section shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil and gas leasing, together with a statement of the stipulations agreed upon by the parties thereto for inclusion in such leases to assure that all operations under the lease shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management where they may be inspected by the public at the usual hours specified for that purpose. Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed.

(e) *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal, and thereafter such offers shall be considered in accordance with the provisions of this section.

d. The Order of the Secretary of the Interior published in the Federal Register of August 2, 1958 (23 F.R. 5883) provides in pertinent part:

> Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement as reflected by the map herein referred to, has been consummated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. The lands excluded from leasing are specifically delineated on the map of the Kenai National Moose Range, set forth below, which was approved on January 29, 1958, and are identified on said map as follows:
>
> *Closed area.* The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:
>
> [Description omitted; essentially the southern half of the Range.]
>
> The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (41 Stat. 437), and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.
>
> All offers to lease must be submitted on Form 4–1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a $10

filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85–505 enacted July 3, 1958.

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8.

All leases will be subject to the special stipulations (Form 4–1383) approved April 18, 1958 and published in the Federal Register April 22, 1958 (23 F.R. 2636, 2637).

FRED A. SEATON,
Secretary of the Interior.

JULY 24, 1958.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17598

JAMES K. TALLMAN, ET AL., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided September 19, 1963

Before WILBUR K. MILLER, BASTIAN and MCGOWAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This is an appeal from summary judgment of the District Court in favor of the Secretary of the Interior in an action to review his decision rejecting appellants' applications for oil and gas leases on land within the Kenai National Moose Range in Alaska.

Since appellants' main attack is on the Secretary's authority to draw various historical conclusions, the chronology of the creation of the moose range and its opening for oil and gas leasing is necessary.

The Kenai National Moose Range was established by Executive Order No. 8979[1] of December 16, 1941. The order, which covered all but a small part of the

[1] 6 Fed. Reg. 6471.

subject lands, withdrew and reserved the area for the protection of the Kenai moose and provided that none of the lands:

> shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the Act of July 3, 1926 * * * 44 Stat. 821, U.S.C., title 48, secs. 360–361, or the act of March 4, 1927 * * * 44 Stat. 1452, U.S.C., title 48, secs. 471–471o.

Subsequently, Public Land Order No. 487[2] of June 16, 1948, withdrew the portion of the subject lands excepted by the 1941 Executive Order.

Between October 15, 1954, and January 28, 1955, certain parties filed applications for oil and gas leases on lands covered by the 1941 and 1948 orders. No immediate action was taken on these applications because, in 1953, the Director of the Bureau of Land Management had suspended action on all *pending* oil and gas lease offers until completion of a study of possible changes in policy and regulations related to the issuance of oil and gas leases within wildlife refuges. Ultimately, these parties were awarded leases on the land in question.

In 1955 the Government began to restore the Kenai National Moose Range to certain private acquisition.

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[2] 13 C.F.R. 3462. The order stated:

> Subject to valid existing rights, the public lands [described] in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation.
>
> This order shall take precedence over, but shall not modify * * * the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941. * * *

First, Public Land Order No. 487 was revoked by Public Land Order No. 1212[3] of September 9, 1955, which provided initially that a small piece of land (not involved in the present suit) was:

> 2. Subject to valid existing rights * * * withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. * * *

The order then proceeded to deal with the remainder of the land restored. After granting preference for homesteading, it provided:

> 6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws * * *
>
> 7. Commencing at 10:00 a. m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws. * * *

On October 4, 1955, Public Land Order No. 1212 was amended[4] to delete the provisions for leasing under the mineral-leasing laws appearing in paragraphs 6 and 7 of the order.

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[3] 20 Fed. Reg. 6795.

[4] 20 Fed. Reg. 7904.

Finally, on January 8, 1958, an amendment to 43 C.F.R. 192.9[5] provided:

> (b) *Leasing policy and procedure.* * * * (3) As to * * * Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. * * *
>
> (4) The remaining lands * * * not closed to oil and gas leasing will be subject to leasing. * * *
>
> (c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b)(3) of this section shall be published in the Federal Register. * * * The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management. * * * Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

The Bureau of Land Management and the Fish and Wildlife Service concluded their agreement and it was approved by the Secretary of the Interior. The order of the Secretary was published on August 2, 1958[6] designating the lands in the Moose Range which were not subject to oil and gas leasing, and providing that the balance of the lands within the

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[5] This regulation provided a comprehensive plan for oil and gas leasing of wildlife refuge lands, including the Kenai National Moose Range.

[6] 23 Fed. Reg. 5883.

Range were subject to the filing of oil and gas lease offers. The order stated:

> Offers to lease covering any of these lands which have been pending and upon which action was suspended * * * will now be acted upon and adjudicated in accordance with the regulations.

The order also stated that all lease offers filed within ten days after the date established by regulation 43 C.F.R. 192.9 for acceptance for filing would be treated as simultaneously filed, and further:

> The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedures outlined in the regulation 43 C.F.R. 295.8.[7]

On or after August 14, 1958, appellants filed their respective offers to lease[8] pursuant to § 17 of the

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[7] 43 C.F.R. 295.8:

Processing of simultaneous applications. All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. * * *

* * * * *

(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations.

[8] All of the appellants, except Waldo E. Coyle, filed their offers for land covered by Executive Order No. 8979 of

Mineral Leasing Act, as amended, 30 U.S.C. § 226 (Supp. III, 1958).

Some time after appellants' applications had been filed, the Department of the Interior, without notice to appellants, issued leases for the lands in question to the representatives of major oil companies based on offers filed by them between October 15, 1954, and January 28, 1955, as above stated.

On September 4, 1959, a little more than a year after the filing of appellants' offers, a public drawing was held to determine the priorities between simultaneously filed oil and gas lease offers pursuant to the provisions of 43 C.F.R. 295.8. Appellants prevailed in this public drawing, in which the oil companies were not represented. But their victory was short-lived, for their lease offers were rejected by the Anchorage Land Office on the grounds that they conflicted with the leases issued the previous fall.

Appellants duly appealed to the Director of the Bureau of Land Management, where their appeals were denied in decisions rendered in July, 1960. Appeals from these decisions were taken to the Secretary of the Interior and were rejected by a deputy solicitor of the Department in an opinion dated September 1, 1961, granting leases within the Range based on the 1954 and 1955 offers. A petition for the exercise of supervisory authority by the Secretary of

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December 16, 1941. Coyle filed an offer for land originally excluded by that order but subsequently included in Public Land Order No. 487 of June 16, 1948. The land covered by the 1948 order was opened to oil and gas leasing by Public Land Order No. 1212 of September 9, 1955, as modified by the amendment of October 14, 1955. The applicants awarded priority over Coyle filed their offers prior to Order No. 1212, so the question presented by Coyle is whether Order No. 487 closed the land to oil and gas leasing.

the Interior was filed on February 15, 1962. This petition was denied *on the merits* on April 25, 1962. Thereafter, and on June 8, 1962, appellants filed this suit in the District Court against the Secretary of the Interior. The Secretary first filed a motion to dismiss based on the ninety-day statute of limitations contained in 30 U.S.C. § 226–2 (Supp. III, 1958). Then both sides moved for summary judgment. The District Court granted the motion of the Secretary for summary judgment and denied the motions of appellants for summary judgment, specifically stating that the ground of noncompliance with the statute of limitations did not form a part of his decision, and further specifically denying the Secretary's motion to dismiss based, as stated, on the ninety-day statute of limitations. Appellants appealed to this court on December 31, 1962.

Appellants' principal contention is that the 1941 Executive Order closed to oil and gas leasing the land in the Kenai National Moose Range covered by that directive, and that this land remained closed until it was opened by the amendment of 43 C.F.R. 192.9 in January 1958. They argue that the order prohibits "disposition [of any lands within the Range] (except for fish trap sites) under any of the public-land laws applicable to Alaska," and, since the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, is a "public-land law applicable to Alaska," it follows that oil and gas leasing under that Act is prohibited.

We think the Executive Order clearly did remove the land involved from oil and gas leasing and appellants' contention in this regard is correct. And there is no doubt that the Mineral Leasing Act of 1920 is a public-land law applicable to Alaska.*

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* 43 C.F.R. 71.1 (1954).

The Secretary argues, however, that the acts of July 3, 1926, and March 4, 1927, specifically included in the 1941 order, are also public-land laws applicable to Alaska, and that, consequently, the order could not have been designed to include all such public-land laws but only those laws relating to the complete alienation of the title of the United States in the land. The Secretary argues that, since the Mineral Leasing Act does not provide for the alienation of the title of the United States, and since the order did not expressly withdraw the lands from the operation of that Act, the land covered by the 1941 order was open to oil and gas leasing in 1954 and 1955, when the offers conflicting with appellants' offers were filed.

There are persuasive counter-arguments to the Secretary's contentions. As the deputy solicitor himself noted, the acts specifically included in the Executive Order, unlike the Mineral Leasing Act, are not public-land laws of general applicability throughout the United States but are laws applicable only to Alaska. We think the phrase "public-land laws applicable to Alaska" means those laws of general applicability throughout the country which are made applicable to Alaska by the act of August 24, 1912, 37 Stat. 512, 48 U.S.C. 23, 43 C.F.R. 51.1; otherwise, the order would not have included the two acts specifically mentioned.

The specific exemption for fish trap sites in the order strengthens our conviction. If the order were designed to cover only the total alienation of the interest of the United States, then specification of fish trap sites would be unnecessary, for permission to fish by traps is acquired not by deed but by a license, similar in many respects to a lease. Furthermore, the specific inclusion of one exception in the

order indicates that other exceptions should not be implied (as the Secretary urges) but that the prohibition on disposition should be read in an expansive manner.

Appellants make copious reference to the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, pointing out the similarity between the wording of that statute and the Executive Order of 1941 and the Public Land Order of 1948. Using this evident similarity, they urge that the cases which have construed the Pickett Act to permit the President to withdraw public lands from oil and gas leasing [10] also provide judicial interpretation of the 1941 and 1948 orders. The cases dealing with the Pickett Act certainly are not dispositive of the question before us, but they are not wholly irrelevant since they do indicate that it is more likely that these words were used to provide expansive coverage rather than the narrow coverage the Secretary now urges.

In sum, we hold, as to all appellants other than Coyle, that the lands in the Kenai National Moose Range were closed to oil and gas leases by the terms of the order creating the Range in 1941 until it was opened on August 2, 1958. Accordingly, the leases issued to parties other than those appellants were a nullity because applications therefor were filed prior to the opening of the Range to leasing. While the lands filed on by the appellant Coyle present a somewhat different picture from those of the other appellants, no material difference exists between his claim and theirs. The lands on which Coyle filed were

[10] *Bordieu* v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936); *Wilbur* v. *United States ex rel. Barton*, 60 App. D.C. 11, 46 F. 2d 217 (1930), aff'd sub nom. *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414 (1931).

originally opened by the 1941 order, but they were closed in 1948 by Order No. 487 and remained closed during the time the offer conflicting with his application was filed. These excepted lands were reopened by Order No. 1212 on September 9, 1955, but no new offers were filed thereafter on the lands covered by the Coyle application. As to the lands filed on by Coyle, we hold that the leases issued to parties other than Coyle were a nullity because applications therefor were filed prior to the opening of the Range to oil and gas leasing.

In reversing the Secretary's interpretation of the 1941 order creating the Kenai National Moose Range, we are aware of the discretion granted agencies in the interpretation of statutes and presidential orders in areas committed to their administration. Deference to agencies does not reach the extent of sanctioning irrational agency action, however; nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the agency's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable. In the case before us the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand.

The Secretary concedes that, if this court determines that any of the orders closed the Moose Range to oil and gas leasing, the only possible defense would be based on 30 U.S.C. 226–2, which provides:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

Admittedly, appellants commenced this action more than five months after the order of the deputy solicitor, acting for the Secretary of the Interior, was filed. However, on April 25, 1962, the Secretary entertained and denied appellants' petition for the exercise of supervisory authority; and the present action was filed within ninety days thereafter. The Secretary argued before the District Court, and again argues before us, that the ninety-day statute of limitations bars this action.

We think the Secretary's reliance on the statute of limitations is without merit. The principle which governs this question is set down in *Outland* v. *Civil Aeronautics Bd.*, 109 U.S. App. D.C. 90, 284 F. 2d 224 (1960).[11]

When a party elects to seek a rehearing there is always the possibility that the order complained of will be modified in a way which would render judicial review unnecessary. Practical considerations, therefore, dictate that, when a petition for rehearing is filed, judicial review may be properly deferred until the petition has been acted upon. We hold, in the circumstances presented here, that the time for filing a petition for judicial review did not begin to run until the petition for rehearing had been acted upon.

The Secretary argues that this rule applies "only where the rules of practice of an administrative agency provide for a petition for rehearing or reconsideration and when one is timely filed." He argues that "there is no provision by statute or regulation

[11] See also *Montship Lines* v. *Federal Maritime Board*, 111 U.S. App. D.C. 160, 295 F. 2d 147 (1961). *Safeway Stores* v. *Coe*, 78 U.S. App. D.C. 19, 136 F. 2d 771 (1943) is not in point, for in that case the Secretary did not lose his jurisdiction to decide on the merits the question presented in the petition.

permitting, much less giving, the right to file a petition for reconsideration [of a decision by the deputy solicitor]." A petition to the Secretary for the exercise of supervisory authority is a long standing procedure within the Department of the Interior, which, although not spelled out by statute or regulation, serves many of the same purposes of a petition for rehearing.

The Secretary correctly points out that he has the right to exercise his supervisory power so long as the property in question remains within his jurisdiction. Thus he argues that the time for petitioning for the exercise of his supervisory power might be limitless and the provisions of 30 U.S.C. 226–2 rendered nugatory, for a party losing a decision in the Department could delay his entry into court indefinitely by delaying his petition for the exercise of supervisory power. This argument fails to consider the power of the Secretary to formulate his own rules concerning the submission of the petition. The Secretary can prevent undue delay by setting time limits on these petitions. He is not at the mercy of the losing party, but he can force that party, by appropriate rules or adjudication, to bring petitions for the exercise of supervisory power within a certain time.

In the present case, the Secretary did not reject appellants' petition because it was filed too late, but, rather, he rejected it on the merits. The letter rejecting appellants' petition cannot be read as "an orderly manner of indicating that the [original] communication had been received," but must be read as a rejection of the petition on the merits. Under the circumstances, we believe that appellants may seek review of the order of the Secretary within ninety days after the final rejection of their application on the merits. This they have done.

A different result might well be reached had the Secretary rejected appellants' petition for the exercise of supervisory authority on the ground that it was filed too late; but as stated, he did consider it and denied it on the merits.

It follows that the action of the District Court should be reversed, and judgment entered for appellants.

Reversed.

McGOWAN, *Circuit Judge*, with whom *Circuit Judge* WILBUR K. MILLER joins, *concurring:* We concur fully in the reasons set forth by Judge Bastian for the reversal of the judgment of the District Court. We believe, however, that there is an additional ground why the appellee may not, in this court, press the claim that the statute of limitations bars the relief sought by appellants.

It is clear, in our view, that the District Court passed upon the statute of limitations point adversely to the appellee. The record shows that two separate motions were filed in the District Court by the appellee: one, a motion for summary judgment on the merits, in which was included a statute of limitations ground, and, two, a motion to dismiss the complaint based solely upon the statute of limitations. In its memorandum opinion granting the first such motion, the District Court expressly excepted "that part of the Defendant Udall's motion for summary judgment based on the grounds of non-compliance with the statute of limitations * * *," and stated that that part "should not form part of the basis for the granting of Defendant Udall's motion for summary judgment and, accordingly, Defendant Udall's motion to dismiss is denied." In the judgment subsequently entered pursuant to this memorandum, the ordering

portions recited explicitly that "Defendant's motion to dismiss is denied." The appellee has taken no appeal from this part of the judgment adverse to him.

In the absence of such an appeal, we do not believe that appellee is free to raise the statute of limitations here as a basis of affirmance. Our conclusion in this regard rests on authority of long standing. In *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937), Justice Cardozo, speaking for a unanimous court, said that "[T]he rule is inveterate and certain." There, the plaintiff surety had sought specific performance of a contract supplemental to an agreement of suretyship, or alternatively, exoneration by the contractor of the surety from loss on unpaid bills. The District Court held the surety not entitled to the specific performance requested, but did grant the relief of exoneration. It entered a decree reflecting these dispositions. The contractor appealed from the grant of exoneration, but no cross-appeal was taken by the surety from the denial of specific performance. The Court of Appeals concluded that specific performance, rather than exoneration, was the proper relief and sent the case back with directions to the District Court to revise its judgment to this end.

The Supreme Court held that it was error for the Court of Appeals to take this action at the instance of a nonappealing, albeit successful, litigant. It cited a number of cases, including an early decision of the Supreme Court, wherein it was said:

"Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be

heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *The Maria Martin,* 12 Wall. 31, 40–41.

One of the cases relied upon by Justice Cardozo was *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U.S. 528 (1924). There, the United States had prevailed below on the merits, but it had also contended in the lower court that the venue was improperly laid. This latter point was resolved against it, but on appeal it was renewed. Justice Brandeis, speaking for the entire court, said (at p. 536) that "* * * by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered."

This court has recognized this principle. In *Wisconsin Bankers Association* v. *Robertson,* 111 U.S. App. D.C. 85, 294 F. 2d 714, *cert. denied,* 368 U.S. 938 (1961), the case was litigated below both on the merits and on a challenge to plaintiff's standing to sue. The defendants prevailed on the former, but suffered an adverse ruling on the latter. The standing point was renewed on appeal, but this court said: "As a cross appeal was not filed by the appellees, we cannot consider, and therefore express no opinion concerning, their argument that the District Court erred in holding that appellants had standing to sue. In the absence of a cross appeal, an 'appelee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary * * *.' *United States* v. *American Ry. Exp. Co.,* 1924, 265 U.S. 425, 435, 44 S. Ct. 560, 564,

68 L. Ed. 1087 * * *."[12] See also, *Whitehead* v. *American Security & Trust Co.*, 109 U.S. App. D.C. 202, 285 F. 2d 282 (1960).

It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings.

The defense of the statute of limitations is not jurisdictional and it may be waived at any time. By failing to appeal from the denial of his motion to

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[12] 111 U.S. App. D.C. at 86, 294 F. 2d at 715. The *Railway Express* case appears to have involved a situation where the lower court did not in fact decide or pass upon the ground sought to be raised on appeal. In this situation the successful litigant may well be able to renew the point on appeal as a basis of affirmance. Justice Brandeis reaffirmed the force of the *Peoria & Pekin Union Ry.* holding by this reference (n. 11 on p. 436 of 265 U.S.): "* * * There the objection upon which the appellee relied was one of venue. The District Court overruled it; and then dismissed the bill on the merits. An objection to venue can be waived at any stage of the proceedings. This Court held that it was waived by failure to take a cross-appeal."

dismiss founded upon the statute, the appellee here made such a waiver and cannot now attack that part of the judgment with which he disagrees.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment for appellants.

PER CIRCUIT JUDGE BASTIAN.

Dated: September 19, 1963.

ORDER OF OCTOBER 16, 1963

[Caption omitted]

Before: WILBUR K. MILLER, BASTIAN AND MCGOWAN, Circuit Judges, in Chambers

ORDER

On consideration of appellee's petition for rehearing, and of appellants' answer thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

Dated: October 16, 1963.

ORDER OF NOVEMBER 8, 1963

[Caption omitted]

Before: WILBUR K. MILLER, BASTIAN and MCGOWAN, Circuit Judges, in Chambers

ORDER

On consideration of appellee's motion for leave to file motion for reconsideration, and it appearing that appellee's motion for reconsideration of denial of petition for rehearing has been lodged with the Clerk, it is

ORDERED by the Court that the aforesaid motion for leave to file be granted, and the Clerk is hereby directed to file appellee's motion for reconsideration of denial of petition for rehearing in this case, and on consideration whereof, it is

FURTHER ORDERED by the court that appellee's motion for reconsideration of denial of petition for rehearing is denied.

Per Curiam.

Dated: November 8, 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1964